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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 88 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.
2. To be referred to the Reporter or not? No.

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3. Whether Their Lordships wish to see the fair copy of the judgement? No.
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.
5. Whether it is to be circulated to the Civil Judge? No.

BABUKHAN HEIDARKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

MR G RAMAKRISHNAN for appellant.
MR SP DAVE, A.P.P. for Respondent.

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 13/02/98

ORAL JUDGEMENT

The appellant herein has brought under challenge his conviction and sentence for the offence punishable

u/s 20 (b) (i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short) and u/s 66 (b) of the Bombay Prohibition Act rendered by the learned Additional Sessions Judge, City of Ahmedabad. As per his impugned judgment and order dated 5th December, 1994 in Sessions Case No. 75 of 1994, the appellant has been sentenced to rigorous imprisonment for a period of four years and to pay fine of Rs.5,000/- i/d rigorous imprisonment for five months. He has also been sentenced to rigorous imprisonment for a period of six months for the offence punishable u/s 66 (b) of the Bombay Prohibition Act and to pay fine of Rs. 1,000/- i/d rigorous imprisonment for a period of 2 months. The learned Additional Sessions Judge directed both the substantive sentences to be undergone simultaneously.

2. The facts of the prosecution case may briefly be referred to from the impugned judgment.

On 3rd June, 1992 Police Constable of Gomatipur Police Station Mr. Faridmiya Husenmiya Malek was on his duty during the period between 6-00 to 6-15 in the evening when he received the information that one person with beard wearing pant and jacket was to proceed with narcotic substance of "Ganja" from Kalidas four roads to Chartoda kabrastan and he immediately informed P.S.I. Mr. R.N. Chauhan who after making necessary entry in that respect in the station diary, informed his superior officer Police Inspector Chandansing Hadmatsing Chauhan who thereupon called panchas Sultansing Dharmsing and Bhikhabhai Ramabhai at Gomatipur Police Station. He explained the panchas about the information and the panchas having given their consent preliminary panchanama was recorded. Thereafter, the police persons including Police Constable Faridmiya and panchas reached Kalidas four roads and they stood at difference places for watch. Soon after the person with aforesaid description was found coming from Hathikhai, he was shown to the panchas. After ascertaining that he was the same person, he was stopped. He was found to have a big plastic bag. On being asked he stated that he was Babukhan Haidarkhan residing at Chartoda Kabrastan, Ahmedabad. He was informed that he was to be searched and that if he wanted to search the police persons he could do so. The accused having consented for taking search of the police persons and the panchas the accused was permitted to carry out search. But nothing objectionable was found in such search. The accused was then asked if he wanted his search being carried out in presence of the Gazetted Officer or Magistrate. Thereupon he informed that he would like to be searched in presence of a Gazetted

Officer with the result that Gazetted Officer P.I. Chandansing Hadmatsing Chauhan was called. The accused was then searched in presence of Police Inspector Mr. Chandansinh Hadmatsing Chauhan, Gazetted Officer and it was found that the plastic bag which the accused had with him contained material in the form of dry green leaves and branches and on smelling the same material it revealed "Ganja". One Rameshkumar Maganlal Jain was thereupon called for weighing the material. It was weighed 2.200 gm. "Ganja". 0.200 gm. of material was taken by way of a sample in a plastic bag which was placed in the small tin container. Slip duly signed by the panchas, P.S.I. Mr. R.N. Chauhan and P.I. Mr. Chauhan was attached and the container was accordingly sealed. Remaining 2 k.gm. was placed in the plastic bag and that plastic bag was placed in the big square tin container. A slip duly signed by the panchas, P.S.I. Mr. Chauhan and P.I. Mr. Chauhan was placed in the plastic bag. The container was sealed with impression of P.I., Gomatipur Police Station, Ahmedabad City. Then P.S.I. Mr. Chauhan had written his complaint and submitted his report and forwarded the same along with the sealed container, the accused person, the panchanama and the report to Gomatipur Police Station, where P.S.O. Head Constable Mr. Chaturbhai had made an entry with regard to the said complaint and other materials in the Police Station diary and the offence was registered as CR. No. 376/94 at 9-00 O'clock at night. The papers were sent to P.S.I. Mr. Chauhan for further investigation. Muddamal "pavti" was prepared and the muddamal articles were handed over to the Police Station Crime Writer Head Constable Mr. Abbasmiya Abddulmajid Malek in sealed condition as they were. Mr. Malek also made necessary entry in that respect (Entry No. 375) in the Reserve ("Anamat") Register. Sample muddamal was handed over to Shivsing Sohansing Sisodiya on 5-6-1992 for the same being taken to Forensic Science Laboratory (F.S.L. for short). Shivsing's signature was obtained in the Reserve Register in that respect. Muddamal sample was handed over in the same condition in F.S.L. by Shivsing Sohansing Sisodiya. Upon receipt of the F.S.L. report showing that the muddamal article contained "Ganja" the charge-sheet was presented and ultimately the case was committed to the City Sessions Court, Ahmedabad.

3. Charge was framed at exh. 3. The accused having not pleaded guilty to the charge he was tried before the Additional City Sessions Judge. After conclusion of the evidence further statement of the accused was recorded u/s 313 of the Cri. Procedure Code, 1973 and there it has been the defence of the accused that the Police

Inspector had gone to Chartoda Kabrastan and was going to Dargah with his shoes and since the accused refused to allow Police Inspector to go inside Dargah with shoes on, shoes he has been falsely implicated in this case. After hearing the arguments of both the sides the learned Additional City Sessions Judge has rendered the impugned judgment and order of conviction and sentence, as aforesaid.

4. I have heard Mr. G. Ramkrishnan appearing for the appellant and Mr. S.P. Dave, learned A.P.P. for the respondent.

5. Mr. Ramkrishnan has read the oral evidence adduced before the learned Additional City Sessions Judge and has also made reference to the documents which have been placed on record.

6. Realising that all the formalities as required under the provisions of Section 42 and 50 of the NDPS Act, were complied with. Mr. Ramkrishnan concentrated on the evidence of the panchas and made his submissions on such evidence. The evidence of the panchas will be considered hereafter. Mr. Ramkrishnan has also submitted that in the present case although it has come in the prosecution evidence that the accused was given option of being searched in presence of a Gazetted Officer or Magistrate, the evidence does not clearly disclose such option having been given to the accused. In reply Mr. S.P. Dave, learned A.P.P. has relied upon the decision rendered by this Court in the case of D.B. Thakur V. State, reported in 37-1 (1996-1) G.L.R. 219. He has also relied upon the recent judgment of the Apex Court in the case of State of U.P. Vs. Pirthi Chand and Another, reported in 1996 Supreme Court Cases (Cri.) 210.

7. Apart from the decisions which have been referred to by learned A.P.P. it clearly appears from the evidence adduced before the learned Additional City Sessions Judge that the accused had been given a clear option of being searched in presence of a Gazetted Officer or Magistrate and nothing has come out in the evidence that he was not given such option. Assuming for the sake of argument that such option was not made available to the accused and he was given option of only a Gazetted Officer for himself being searched in presence of such officer, it cannot be said that there is noncompliance of Section 50 of the NDPS Act. Section 50 of the NDPS Act as considered in the aforesaid decisions clearly indicates that the accused person if he so desires might be taken to the nearest Gazetted Officer of

any department u/s 42 of the Act or to the nearest Magistrate. It is not that he is required to be given both the options. Besides, it is settled law that it would be the choice of the concerned officer asking the accused to select Gazetted Officer or Magistrate, who is easily and readily available. In that view of the matter, I do not find any substance in the submissions made by Mr. Ramkrishnan that there is violation of Section 50 of the NDPS Act.

8. Needless to say that the prosecution has examined all the witnesses namely (i) P.W. No. 1 Sultansing Dharamsing Exh. 7, (ii) P.W. No. 2 Rameshkumar Maganlal Jain Exh. 11, (iii) P.W. No. 3 Faridmiya Husenmiya Malek Exh. 12, (iv) P.W. No. 4 Chandansinh Hadmatsinh Chauhan Exh. 15, (v) P.W. No. 5 Chaturbhai Mulabhai Exh. 19, (vi) P.W. No. 6 Abbasmiya Abdulmajid Malek Exh. 22, (vii) P.W. No. 7 Shivsinh Sohansinh Sisodiya Exh. 25, (viii) P.W. No. 8 Bhikhabhai Ramabhai Desai and (ix) P.W. No. 9 Ramsing Naranji Chauhan. The prosecution has also relied upon the documentary evidence in the form of panchanama exh.8, report of F.S.L. Exh. 18, all the seizure slips as also seizure memo including the muddamal articles and all the necessary entries made in the respective registers and diaries having been referred to by learned Additional City Sessions Judge in his judgment. It will be noted here itself that the learned Additional City Sessions Judge has gone through the facts of the prosecution case and found them having been established beyond reasonable doubt from the prosecution evidence; both oral and documentary. He has also considered the oral evidence of the pancha witnesses who have been declared hostile. He has also observed in his judgment that from the evidence of the hostile pancha witnesses some relevant facts of the prosecution case have found corroboration.

9. However, for the purpose of appreciating the submissions of Mr. G. Ramkrishnan flowing from the evidence of the pancha witnesses, the evidence of these witnesses might be referred to. First Pancha witness P.W. No. 1 Sultansing Dharamsing Exh. 7 in his examination in chief has admitted that he was required to act as a pancha. However, he has not supported the prosecution case in respect of the manner in which he was called upon to remain as pancha in respect of the incident that was to happen. He has admitted that the man who had reached at the place was Babukhan Haidarkhan and upon his examination by the police a plastic bag was found and the same contained "charas". But he did not know how much was its weight. He has admitted that the panchanama was

made and his signature was taken therein and nothing else was done in his presence. He was declared hostile bearing in mind the fact that the pancha witness has supported the prosecution that "charas" was found from the accused person and also bearing in mind the fact that the pancha witness was not supporting the prosecution case in respect of some other details of the panchanama. In his cross-examination this pancha witness has admitted that he in the company of other pancha witness and police persons had gone to the place of Kalidas four road and remained in watch of the person of the description stated earlier. He has admitted that one person was proceeding from Hathikhai side with a weighty plastic bag and the police had recognised that person in presence of the panchas and upon asking his name and address he disclosed that he was Babukhan Haidarkhan Pathan, residing at Chartoda Kabrastan. He has also admitted that the accused was asked about the search of the police persons and panchas and he had searched them and found nothing objectionable from them from that search. He has also admitted that he was asked for being searched in presence of the Gazetted Officer and when he stated that he wanted to be so searched, Police Inspector of Gomatipur Police Station was called and in his presence the accused's plastic bag was opened and it was found that the bag contained dry green leaves. He has also admitted that upon smelling the material it appeared to be "Ganja". He then admitted that one trader Rameshkumar Maganlal Jain was called with weight and measure for the purpose of weighing the material and upon such weighment it was found that the material was weighing 2.200 gm. He then admitted that 0.200 gm. "Ganja" was placed in the plastic bag for the purpose of sample and as appearing in the prosecution story the sample was taken and the remaining material was placed in the container, and as aforesaid they were sealed. He also identified the accused appellant as well as the muddamal articles before the Court. It can thus be said that the hostile witness also supported the prosecution case in his cross examination in all material respects. If that is so, the submission that the prosecution evidence lacks independent corroboration, merits no acceptance. Same is the situation with regard to the other pancha witness p.w. 8 Bhikhabhai Ramabhai Desai exh. 26. This witness has also corroborated the prosecution case in his cross examination on all the relevant aspects of the search and seizure of the muddamal material from the accused person. In view of what is stated above, the submissions of Mr. G. Ramkrishnan flowing from reading of the evidence of pancha witness cannot be accepted.

9. No other submission has been made contrary to what has been observed by the learned Additional City Sessions Judge. In that view of the matter, this appeal deserves to be dismissed

10. It is reported by the learned A.P.P. Mr. Dave that the appellant has suffered his sentence and has been released on 9-1-1998 and hence no further order in that respect is required to be passed. Accordingly, this appeal is dismissed.

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